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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 595

W. O. ROBERTS, SUPERINTENDENT OF THE FIVE TRIBES AGENCY, FOR AGNES QUAPAW HOFFMAN AND JEAN ANNE QUAPAW HOFFMAN, RESTRICTED QUAPAW INDIANS,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

HUSTON THOMPSON,
OSCAR P. MAST,
Counsel for Petitioner.

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vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, W. O. Roberts, Superintendent of the Five Tribes Agency, acting on behalf of the Secretary of the Interior, for Agnes Quapaw Hoffman, and Jean Anne Quapaw Hoffman, restricted Quapaw Indians, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above entitled causes on the third day of January, 1950.

Opinion Below

The opinion of the Court of Claims is not as yet officially reported but is found on pps. 14-26 of the Record.

Jurisdiction

The judgment of the Court of Claims was entered on the third day of January, 1950 (R. 26). The jurisdiction of this Court is invoked under Title 28, United States Code, section 1255.

Questions Presented

(1) Whether Congress, having created an *Instrumentality,* the purpose of which is the protection of a restricted Indian and his descendants, so as to keep them from becoming charges on the United States, and selected the Secretary of the Interior and endowed him with complete and absolute power to conserve the Instrumentality, has the Bureau of Internal Revenue the right to interfere with the Secretary of the Interior in his efforts to administer it so that he cannot fulfill the Congressional purpose?

(2) Whether the Bureau of Internal Revenue, where it is agreed that there is no tax exemption involved, has the right to prevent the Secretary of the Interior from taking a deduction for income tax purposes of an admittedly "necessary and reasonable" legal expenditure, in the protection of the Congressional Instrumentality created for a restricted Indian and his descendants?

(3) Whether the Secretary of the Interior, the agent of Congress, who necessarily has placed the restricted Indian where he is not permitted to *make a profit or loss sale,* must so discriminate against the restricted Indian that he cannot deduct for income tax purposes "a necessary and reasonable legal expenditure", made in protecting the Congressional

Instrumentality, while an *unrestricted* white *citizen* has the privilege of reducing an income tax, through a profit or loss sale of assets of a trust estate?

Statement

Agnes Quapaw Hoffman is a citizen of the United States; a resident of Ottawa County, Oklahoma; a restricted full-blood Quapaw Indian; the widow of Benjamin Quapaw, deceased; and the wife of Henry E. Hoffman (R. 15).

Jean Anne Quapaw Hoffman is a citizen of the United States; a resident of Ottawa County, Oklahoma; a restricted full-blood Quapaw Indian; the daughter of Benjamin Quapaw, deceased, and Agnes Quapaw Hoffman; and the step-daughter of Henry E. Hoffman (R. 15).

Benjamin Quapaw, deceased, was a citizen of the United States; a restricted full-blood Quapaw Indian; a resident of Ottawa County, Oklahoma, at the time of his death on May 26, 1926. He was then seized and possessed of (a) three restricted allotments of Quapaw tribal lands, (b) certain mineral leases thereon yielding a 10% royalty, (c) certain lots in Baxter Springs, Kansas, which had been purchased with funds received as royalties from such mineral leases, (d) a tract of land and farm in Ottawa County, Oklahoma, also purchased with royalty funds, (e) farm machinery and equipment, farm animals, automobiles, household furniture and fixtures, (f) $347,876.78 in cash, (g) $74,200.00 in Liberty Bonds, and (h) $10,000.00 in U. S. Treasury Certificates (R. 15-16).

All of the above described property was fully restricted and could not be sold, alienated, hypothecated, or otherwise disposed of without approval of the Secretary of the Interior (R. 16).

Benjamin Quapaw left a will executed October 28, 1924, devising and bequeathing all of his property and estate to

his wife, Agnes, and his daughter, Jean Anne, in equal shares. Such will was approved "so far as it relates to property under control of the United States" by the Assistant Secretary of the Interior on March 14, 1927 (R. 16).

About twelve years after the death of Benjamin Quapaw and the approval of his last will, and after an unsuccessful petition to the Secretary of the Interior, certain litigation arose in the United States District Court for the Northern District of Oklahoma, in which two suits were filed against Agnes Quapaw Hoffman and Jean Anne Quapaw Hoffman, and others (R. 16-17).

The first suit involved a claim by one Lilia Quapaw Hanson for an undivided one-half interest in the estate on the ground that she was the daughter of Benjamin Quapaw by a former lawful marriage. This suit questioned the validity of the will and also the validity of the marriage of the decedent to Agnes Quapaw Hoffman. This suit was finally dismissed on the merits, after the first decision of the District Court had been reversed on appeal, and judgment was entered for the defendants (R. 16).

After the termination of the above suit in 1942, another suit was brought by one Stella White against Agnes and Jean Anne Hoffman, and others, in which she claimed that she was entitled to share in the estate as a lineal descendant of Benjamin Quapaw by his alleged first marriage. This suit questioned the validity of the will. This suit also resulted in a judgment in favor of the defendants (R. 17).

In the defense of these two suits Agnes and Jean Anne Hoffman, with the approval of the Secretary of the Interior, employed attorneys to defend their interests in the estate of Benjamin Quapaw (R. 17).

The litigation expenses and attorneys' fees paid in the first suit by Agnes and Jean Anne Hoffman during 1942 and such fees and expenses paid for Agnes Hoffman in 1943 in connection with the second suit, from their restricted funds,

were approved by the Secretary of the Interior, both as to the necessity therefor and the reasonableness of the amounts (R. 22).

The amount paid in 1942 by Agnes Quapaw Hoffman, on account of such fees and expenses in the first suit, was $30,050.95, and the amount paid by Jean Anne Quapaw Hoffman in 1942, as her share of such fees and expenses, was $42,550.64. Agnes Quapaw Hoffman had, prior to 1942, paid $12,599.68 on account of such fees and expenses (R. 17).

In connection with the second suit, Agnes Quapaw Hoffman paid fees and expenses in the amount of $32,732.22 during 1943. No payment was made by Jean Anne Quapaw Hoffman during 1943, on account of such fees and expenses (R. 17).

During 1943 and 1944 H. A. Andrews, then Superintendent of the Quapaw Indian Agency, who had charge of the books and accounts of the Indians, prepared and filed separate Federal income tax returns for Agnes Quapaw Hoffman and Jean Anne Quapaw Hoffman. In the 1942 and 1943 returns for Agnes Quapaw Hoffman he claimed the amounts of $30,050.95 and $32,732.22, respectively, paid by or for her as above stated, *as deductions from gross income under Section 23(a)(2) of the Internal Revenue Code* (first enacted as Section 121 of the Revenue Act of 1942, 56 Stat. 798). In the 1942 return for Jean Anne Quapaw Hoffman a similar deduction was claimed for the amount of $42,550.64 paid by or for her in that year. These returns were prepared on the cash receipts and disbursements basis (R. 17-19).

Thereafter, the Commissioner of Internal Revenue denied the aforesaid deductions and assessed deficiencies and interest thereon against Agnes Quapaw Hoffman and Jean Anne Quapaw Hoffman in the respective amounts of $45,892.62 and $10,445.35. Said amounts of $45,892.62 and

$10,445.35 were paid to the Collector of Internal Revenue on December 2, 1947 (R. 18).

Petitioner filed claims for refund on behalf of Agnes Quapaw Hoffman in the amount of $45,892.62 and on behalf of Jean Anne Quapaw Hoffman in the amount of $10,445.35 on May 20, 1948. The Commissioner of Internal Revenue disallowed said claims for refund in full on July 30, 1948 (R. 18-20) and petitioner brought these actions to recover said amounts of $45,892.62 for Agnes Quapaw Hoffman and $10,445.35 for Jean Anne Quapaw Hoffman.

The Court of Claims found against petitioner on both of said claims.

The restricted, allotted, and inherited lands belonging to Benjamin Quapaw, deceased, devised to his wife and daughter, are fully restricted in the hands of the devisees and cannot be sold or otherwise disposed of without the approval of the Secretary of the Interior (R. 20).

The policy of the Secretary of the Interior *is, and always has been, that no restricted lands producing oil, gas, lead, zinc, or other valuable minerals, would be sold or the restrictions removed therefrom so long as such lands were valuable for the production of royalty income.* By reason of this policy the Secretary of the Interior would not consent to the sale or other disposition of the restricted, allotted and inherited lands devised to the taxpayers herein by Benjamin Quapaw, deceased (R. 20).

The continuing and permanent policy of the Secretary of the Interior is to defend the Indians against the encroachment or claims of non-Indians. When there is a dispute between Indians the policy of the Department is not to take sides, but to allow the Indians to select their own counsel in all cases where litigation is necessary. The Department fixes the amount of attorney's fees and other expenses to be expended from restricted funds, as was done in these cases (R. 20-21).

Statutes and Regulations Involved

The statutes and regulations involved will be found in the Appendix, *infra.*

Specification of Errors to Be Urged

The Court of Claims erred:

(1) In failing to find for the plaintiffs;

(2) In discriminating against the restricted Indian and failing to follow the general position taken by this Court in *Carpenter* v. *Shaw,* 280 U. S. 363, and other cases, that in tax matters involving restricted Indians the rule of "liberal construction" should be applied;

(3) In holding that the application of the income tax statutes as proposed by the Bureau of Internal Revenue would not place the restricted Indian in a more unfavorable position than the unrestricted Indian or white citizen;

(4) In holding that a Congressional Instrumentality, created for the benefit of the restricted Indians, is, for tax purposes, in the same category as the assets of an unrestricted person in an *ordinary trust;*

(5) In holding that the restricted Indian could obtain the same benefit that any white or unrestricted taxpayer could obtain from similar expenditures;

(6) In holding that the expenditure of legal fees and expenses here involved was a capital expenditure and in failing to recognize that at least three-fourths of the assets of the Congressional Instrumentality were income which accrued after the death of the decedent and were not invested capital;

(7) In failing to give the word "conservation", found in Section 23(a)(2) of the Internal Revenue Code, a "liberal"

application and construction when applied to a Congressional Instrumentality set up for the protection of the restricted Indian;

(8) In failing to recognize and give effect to the policy of the Secretary of the Interior, set forth in the Special Findings of Fact, not to consent to the sale or other disposition of the restricted, allotted and inherited lands here involved so long as said lands are producing valuable minerals;

(9) In subjecting the restricted Indians to unfair discrimination and depriving them of the equal protection of the law.

Reasons for Granting the Writ

(1) Because this is a case of first impression, involving a new and an anomalous situation, reversing a long time and frequently used administrative interpretation of the Department of the Interior, in cases relating to the taxes of restricted Indians;

(2) Because the decision of the Court of Claims is at variance with the policy of liberal construction expressed by this Court in previous decisions relating to restricted Indians;

(3) Because the ruling of the Bureau of Internal Revenue does a specific injury to the restricted Indians and places them in a position far less favorable than a white unrestricted citizen;

(4) Because of the great importance of the question involved to the Secretary of the Interior in the administration of a Congressional Instrumentality;

(5) Because the restrictions, necessarily invoked by the Secretary of the Interior for the protection of the Congressional Instrumentality and the Indians thereunder, give the

Indian no opportunity for relief, whereas in the case of an ordinary trust, the white unrestricted citizen may obtain relief;

(6) Because the Congressional Instrumentality here involved is not a capital investment, and the legal expenditure relating thereto is not a capital expenditure, and because at least three-fourths of the assets of the Instrumentality have been income which accrued after the death of the decedent and not capital invested;

(7) Because the Court of Claims, in supporting the refusal of the Bureau of Internal Revenue to refund the income taxes paid by the Secretary out of the Congressional Instrumentality, in effect made the act of the Bureau final, and since the Indians have no right of appeal, they have been denied a benefit to which they are entitled.

(8) Because the Indians have been subjected to unfair discrimination and deprived of the equal protection of law.

Conclusion

WHEREFORE, petitioner respectfully prays that the writ of certiorari may issue.

HUSTON THOMPSON,
OSCAR P. MAST,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 595

W. O. ROBERTS, Superintendent of the Five Tribes Agency, for Agnes Quapaw Hoffman and Jean Anne Quapaw Hoffman, Restricted Quapaw Indians,

Petitioner,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Point I

The history and background of the Quapaw Indians involved.

Point II

The lower Court's construction places the restricted Indian in a less favorable light than a white or unrestricted citizen.

Point III

This is not a suit to quiet title.

POINT IV

The legal expenditure here was for the protection of a Congressional Instrumentality, and not an expenditure within the usual meaning of that phrase in Treasury Regulations 111, section 29.23 (a)-15.

POINT V

The expenditure here was not a capital expenditure nor one to protect a capital investment.

POINT VI

The principle of protection has been extended much further in the *Jacob Pierce* (103 Ct. Cls. 199) and *Punskee Field* (109 Ct. Cls. 1) cases for the benefit of the restricted Indian than it would be here.

POINT VII

The Indians have been subjected to unfair discrimination and deprived of the equal protection of the law.

POINT I

The History and Background of the Quapaw Indians Involved

As a preliminary to answering the questions involved in this case, it should be stated that it is admitted by all parties that there is no question of tax exemption involved. The deduction asked for is also admittedly "a fair and reasonable legal expenditure" by the Secretary of the Interior, in the protection of a Congressional Instrumentality.

The Court apparently bases its position on the ground that there is no distinction to be made between Indian deductions and those of white unrestricted citizens in tax

matters where Section 23(a)(2) of the Internal Revenue Code and Treasury Regulations 111, section 29.23 (a)-15 are invoked. All the cases cited by the Bureau and referred to by the Court are those for claims and rights of unrestricted citizens.

This Court has said that in tax matters the Government should liberally construe its tax relations with the restricted Indians and should apply the rule "exactly to the contrary" of that applied to white or unrestricted citizens. (*Choate* v. *Trapp,* 224 U. S. 665; *Carpenter* v. *Shaw,* 280 U. S. 363; *Oklahoma Tax Commission* v. *United States,* 319 U. S. 598.)

The Secretary of the Interior suggests that the Bureau and the Court have not only *not* applied the rule of "liberal construction" here, but have done exactly the contrary, and they have done it to restricted Indians where the effect is much more severe than in the case of a white citizen.

In order that the Court may understand the unfair discrimination suffered by these restricted Indians, it is necessary to give their background.

The Quapaws were once a sub-division of the great Siouan Tribe of Indians originating in North Carolina and moving west along the Wabash River in Ohio. The Tribe split up and those going down the Mississippi, were designated Quapaws, the word meaning "going downstream, or with the current". De Soto's expedition in 1541 estimated about 6,000 Quapaws located at the junction of the Mississippi and the Arkansas. He reports that they were gay, civil, liberal, peaceful, well-built, of superior intelligence, and given to pottery making, weaving, farming, and fishing, and were mound builders.[1]

As these Indians were peaceful they were pushed around and about by our Government into wretched swamp country,

[1] (Handbook of American Indians North of Mexico. Congressional Document 5002, House Volume 62, 59th Congress, First Session, 1905-'06.)

until they were finally reduced by sickness and loss of land and crops to about 300 persons. In this period they were traded out of millions of acres of the best land in the Middle West. The story is a tragic one so far as the Quapaws are concerned. An enlightening picture of these Indians is found in the Executive Papers now in the possession of the United States Archives, Book D, file no. 14E3, dated May 8, 1818.

Ultimately, this remnant of a tribe was placed in the northeastern part of what is now Oklahoma, and is now a sub-tribe to the Five Civilized Tribes. They were put on a reservation and given allotments of wretched-appearing land. Later, a discovery was made of lead and zinc deposits on the allotments of a few, and to these fortunate ones, it has been very remunerative, though the deposits and income are now diminished. One of the favored few was Benjamin Quapaw, the deceased husband and father of the two restricted Indians for whom the Secretary of the Interior, through the Superintendent, is now appearing before this Court.

In 1895 Congress authorized, and the Secretary of the Interior designated, as a Congressional Instrumentality, an allotment of land for the protection of Benjamin Quapaw and his descendants, to keep them from becoming a charge on the Government.

The Secretary of the Interior, without the advice or consent of Benjamin Quapaw, leased his allotment for the mining of lead and zinc. Under his powers, he took the income therefrom, which, in total, has been approximately three-fourths of the assets of the Instrumentality, deposited it in banks where it paid practically no interest, or purchased Government bonds the sale of which was very necessary and advantageous to the Government. Or he deposited some part of it with the Treasury. Except in the case of the

bonds, it has paid practically no interest to the Instrumentality. In doing this, the Secretary was obeying the strict letter of the law.

The Bureau insists, and the Court of Claims supports it in its decision, that the Congressional Instrumentality is in all respects, for taxing purposes, similar to *investment trusts* such as are entered into by unrestricted citizens. The Bureau and the Court have invoked the language of Treasury Regulations 111, section 29.23 (a)-15 to the effect that "attorneys' fees paid in a suit to quiet title to lands are not deductible."

As both the Bureau, and the Court, claim that the same strict application and interpretation should be applied to the Congressional Instrumentality as is applied to an "ordinary trust" of an unrestricted person, these positions necessitate an examination of a Congressional Instrumentality in order to contrast it with an *"ordinary trust"*, as follows:

In the case of the Congressional Instrumentality, Congress having created it, gave it a life of 25 years, except where the Secretary, in his discretion, might turn the allotment over to the Indian, unrestricted. But at the expiration of the 25 years Congress again extended the restrictions. Now, for the third time, Congress has made an extension to 1971.

Under these extensions Benjamin Quapaw died without ever being permitted any authority or jurisdiction whatsoever over the allotted property, receiving only such part of the income as the Secretary of the Interior thought he ought to have, and having permission to occupy the land. The restrictions include the following:

The Indian cannot pass the Congressional Instrumentality by will or otherwise, to anybody except those approved by the Secretary, who, in the past, has nullified many wills. He cannot lease the property without the approval of the Secretary, who has set aside some 30,000 leases and convey-

ances. He cannot purchase any articles of personal property out of the Instrumentality, though deemed necessary by him for his welfare. Title to all personal property is taken in the name of the United States under a conditional bill of sale, and recorded in the County Court. When such articles wear out or there is no necessity for replacement, the Government relinquishes the title and takes in lieu a replaced or new article with the title still in the United States.

Benjamin Quapaw, though of sound mind, and of age, was never consulted as to the management of the restricted monies and securities and the income of the Instrumentality. He could not get an increase in allowance, except by the consent of the Secretary of the Interior, who could cut that allowance down to a minimum. At all times the Government has used the income from the Instrumentality, except the Indian's allowance, for the benefit of the United States Government, such as the purchasing of bonds during pressure times and placing the money in banks that would be of benefit to the United States, and paying an interest rate of approximately .0063%. In a word, the control of the United States is so complete that the Indian cannot even mandamus the Secretary of the Interior or obtain injunctive relief (*King* v. *Ickes,* 64 F. (2d) 979; *Ickes* v. *Perry,* 64 F. (2d) 982; *Darks* v. *Ickes,* 69 F. (2d) 230).

In the face of this situation, the Bureau and the Court say, despite the restrictions put upon a Congressional Instrumentality, that "the Indians will obtain the same benefit that any white or unrestricted taxpayer could obtain from similar capital expenditures", and, that "the Indians, as the beneficial owners of such property, have the same right to the benefits resulting from capital expenditures that any *beneficiary under an ordinary trust will have.*"

It must be obvious from a mere recital of the facts in this case that the Indians not only were *not* beneficial owners at

the time the tax was assessed, or now, but have not had the same rights from benefits resulting from the expenditures that any beneficiary under an ordinary trust would have for tax purposes.

Point II

The Lower Court's Construction Places the Restricted Indian in a Less Favorable Light Than the White or Unrestricted Citizen.

The Bureau contends, and the lower Court holds in substance, that Section 23(a)(2) of the Internal Revenue Code, and Treasury Regulations 111, section 29.23 (a)-15, should be applied to the restricted Indian's tax exactly the same as to that of a white or unrestricted citizen's investment trust, regardless of any resulting discrimination against the Indian. The Court says (R. 24) that the "restrictions imposed by law . . . cannot be construed, for the purpose of applying the income tax statutes, as placing Indians in a more favorable position than other taxpayers with reference to deductions from gross income."

This declaration is not supported by any cases applying to restricted Indians. None has been presented that is in any way related to the predicament forced on the Indians, nor do they have anything to do with the application of the taxing statutes to a *Congressional Instrumentality* created for the benefit of a restricted Indian.

It is respectfully maintained here that the Secretary's claim for a deduction of the legal expenses does not place the Indians in a more favorable position. On the contrary, the denial of the claim places them in a more unfavorable one. For example, an unrestricted citizen, or one represented by a trustee, can sell, either at a profit or a loss, securities of an ordinary trust, or a capital investment, and derive a tax benefit by adding such expense to his cost basis. But

if a person is a restricted Indian, he cannot sell, and the Secretary of the Interior will not sell, so that he can never get the tax benefit in that way.

Under the agreed facts in this case the opportunity did not, and would not, come to him. So, if the Court of Claims insists on applying this taxing statute and the Bureau Regulation thereunder, to the Congressional Instrumentality and to the restricted Indian, as it would do to an unrestricted white person, there will be a very serious discrimination against these Indians. Such being true, the statute and regulation are not being "liberally construed" for the Indian. On the contrary, they have put him in a very unfair position as compared with the unrestricted white citizen.

Point III

This Is Not a Suit to Quiet Title

Under a previous heading, petitioner has sought to show the restrictions surrounding a Congressional Instrumentality so as to demonstrate the wide difference between it and an ordinary trust.

In this connection, the Court says that the Indians "as the beneficial owners of such property have the same rights to the benefits resulting from capital expenditures that any beneficiary under an ordinary trust would have."

It is respectfully maintained that, first of all, the Indians are *not* now and were *not* during the taxable years beneficial owners of property under a Congressional Instrumentality such as an unrestricted person is under an "ordinary trust", nor is a capital expenditure involved here.

In the instant case, Benjamin Quapaw never came into title possession of his property. He did not because the Secretary of the Interior did not see fit to remove the restrictions, and because Congress extended the control of the property in the Secretary for another 25 years. Moreover,

it is stipulated that the Secretary will never consent to the sale of such property so long as the allotment is producing an income (lead and zinc royalties).

In the case of Benjamin Quapaw, it was producing all during his life. In the case of his heirs, it is still producing, so that 12 years ago, when the suits in question were started and later when the tax was assessed, it was not possible for the petitioners to sell their property either at a profit or a loss, and thus reduce the tax assessed, for they did not have a deliverable title and most likely will not since Congress has extended the restrictions to 1971. All they have is the right of residence on the allotment, and whatever allowance the Secretary may see fit to give them.

The property, both real and personal, is held as a Congressional Instrumentality, and was at the time of the bringing of the lawsuits here in question. All the proceedings, such as the selection of the attorneys, the amount of fees to be paid, and the source of payment, were entirely in the hands of the Secretary of the Interior.

The suits involved the validity of a will and of a marriage. The will was in the absolute control of the Secretary and the property in question was in the control of the Government that created the Instrumentality. The suits were not, therefore, for the purpose of quieting title.

Point IV

The Legal Expenditure Here Was for the Protection of a Congressional Instrumentality, and Not an Expenditure Within the Usual Meaning of That Phrase in Treasury Regulations 111, Section 29.23 (a)-15.

This is not a case of expenditure by an unrestricted citizen incurred in defending or protecting a title to his property. The Secretary repeats that the property is now and always has been in the control and possession of the Gov-

ernment, and will continue until a transfer of title which, in all probability, will not occur during the lifetime of the Indians in question. Hence, the Secretary maintains that this expenditure for legal services, paid by the Secretary of the Interior out of a Congressional Instrumentality was, in fact, an expenditure for conserving the Congressional allotment, and the income therefrom.

A function of the Secretary in conserving the Instrumentality is to see that it goes to the proper party. It was not simply, as in the case of an unrestricted citizen, an expenditure by him for a beneficiary under a testamentary trust. Hence, if the taxing power of the Government has the right to lay a tax upon the allotment and the income therefrom, which is at least three-fourths of the Instrumentality, is it not compelled to allow the Secretary of the Interior the right to deduct for income tax purposes an admittedly necessary and reasonable legal expenditure where the same is used to protect the orderly distribution of the income from the Congressional Instrumentality?

Here we have an anomaly under which it is impossible to apply the strict interpretation of the said Act or Regulation, because the circumstances do not and cannot fit in with or parallel any that can be conjured up with respect to an unrestricted person. Therefore, in the absence of any known method or any cases to the contrary, the Secretary maintains that he must give the Act and the Regulation a reasonable and necessary application, when applied to the unusual circumstances surrounding the Congressional Instrumentality, the restricted Indian, and his taxes.

Point V

The Expenditure Here Was Not a Capital Expenditure Nor One to Protect a Capital Investment

The lower Court (R. 24) holds that the expenditure was one of a capital nature to protect a capital investment, and

should be treated as a part of the cost of the property, and that this ruling has not been changed under the provisions of Section 23(a)(2), citing a number of cases. This is undoubtedly the law with respect to unrestricted citizens in a case of a beneficiary under an ordinary trust. But, as already pointed out, a Congressional Instrumentality does not have the attributes of a capital investment, and the expenditure in the handling, operating, or conserving of the Congressional Instrumentality, is not the same as that of handling a capital investment and therefore should not be treated as a part of the cost of the property, but as a legitimate expenditure in the conserving of all of the different kinds of property involved in the Congressional Instrumentality. Moreover, about three-fourths of the property involved in the suits in connection with which the expenditures were made consisted of income which accrued after the date of death of Benjamin Quapaw.

Point VI

The Principle of Protection Has Been Extended Much Further in the Jacob Pierce and Punskee Field Cases for the Benefit of the Restricted Indian Than It Would Be Here.

In the *Jacob Pierce* (103 Ct. Cls. 199) and *Punskee Field* (109 Ct. Cls. 1) cases the Court of Claims extended the principle of protection to the Indians to the point where it said that the value of the allotments involved in the respective cases would not be subject to an estate tax, and gave complete exemption on this point.

In the instant case, there is no question of exemption involved. It is simply the right to reduce the income tax on the Congressional Instrumentality by deducting expenditures made by the Secretary to protect and conserve it so that it could eventually pass to the proper parties. If the Court, in one set of cases, applies the tax rules liberally for

the restricted Indians, why should it insist on the strict application accorded the white citizen, in a situation far more serious to the Indian?

Point VII

The Indians Have been Subjected to Unfair Discrimination and Deprived of the Equal Protection of the Law

If the lower Court's decision is allowed to stand, these restricted Indians will be deprived of a benefit for income tax purposes which is accorded to all unrestricted taxpayers. This is true for the following reasons:

If the unrestricted taxpayer is denied a deduction for litigation expenses under Section 23(a)(2) of the Internal Revenue Code on the ground that they were capital expenditures, he may add the amount of such expenses to his cost basis and thereby reduce his income taxes when the property is sold.

If a restricted Indian is denied a deduction for such expenses on the ground that they were capital expenditures, he cannot sell his property and therefore never has the opportunity of reducing his income taxes by adding the expenses to his cost basis.

It is submitted that since the Indians, under the lower Court's decision, are deprived of a benefit for income tax purposes which is accorded to all unrestricted taxpayers, the Indians have been subjected to unfair discrimination and deprived of the equal protection of the law.

Conclusion

It is respectfully submitted that, in view of the restrictions surrounding the Congressional Instrumentality, thereby limiting the freedom of action of the Indians, and the restrictions imposed on the Secretary in his efforts to protect the Instrumentality, Section 23(a)(2) of the Internal

Revenue Code and Regulations 111, section 29.23 (a)-15 must be given a reasonable and liberal construction for the benefit of the Congressional Instrumentality and restricted Indians, in obtaining a tax deduction for expenditures made for the protection of the Instrumentality. Otherwise the Indians will have been discriminated against and will not have been treated, according to the policy of this Court, with a liberal interpretation beneficial to them in the application of the circumstances surrounding this case.

Respectfully submitted,

HUSTON THOMPSON,
OSCAR P. MAST,
Attorneys for Petitioner.

APPENDIX

Excerpts from Statutes and Regulations

STATUTES

Internal Revenue Code:

(as amended by Sec. 121 (a), Revenue Act of 1942, c. 619, 56 Stat. 798).

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) Expenses.—

(1) Trade or business expenses.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * * * *

(2) Non-trade or non-business expenses.—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

* * * * * * *

(26 U. S. C. 1946 ed., Sec. 23.)

REGULATIONS

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23(a)-15. Nontrade or Nonbusiness Expenses.—(a) In general.—Subject to the qualifications and limitations in chapter 1 and particularly in section 24, an expense may be deducted under section 23(a)(2) only upon the condition that:

(1) it has been paid or incurred by the taxpayer during the taxable year (i) for the production or collection of income which, if and when realized, will be required to be included in income for Federal income tax purposes, or (ii) for the management, conservation, or maintenance of property held for the production of such income; and

(2) it is an ordinary and necessary expense for either or both of the purposes stated in (1) above.

* * * * * * *

Expenses, to be deductible under section 23(a)(2), must be "ordinary and necessary," which presupposes that they must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or maintenance of property held for the production of income.

(b) Except for the requirement of being incurred in connection with a trade or business, a deduction under this section is subject to all the restrictions and limitations that apply in the case of the deduction under section 23(a)(1)(A) of an expense paid or incurred in carrying on any trade or business. * * *

Expenditures incurred in defending or perfecting title to property, in recovering property (other than investment property and amounts of income which, if and when recovered, must be included in income), or in developing or improving property, constitute a part of the cost of the

property and are not deductible expenses. Attorneys' fees paid in a suit to quiet title to lands are not deductible; but if the suit is also to collect accrued rents thereon, that portion of such fees is deductible which is properly allocable to the services rendered in collecting such rents. Expenditures incurred in protecting or asserting one's rights to property of a decedent as heir or legatee, or as beneficiary under a testamentary trust, are not deductible expenses. * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 595

W. O. ROBERTS, Superintendent of the Five Tribes Agency, for AGNES QUAPAW HOFFMAN and JEAN ANNE QUAPAW HOFFMAN, Restricted Quapaw Indians, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 21-26) is unreported.

JURISDICTION

The judgment of the Court of Claims was entered on January 3, 1950 (R. 26). The petition for a writ

of certiorari was filed on February 11, 1950. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1255 (1).

QUESTION PRESENTED

Whether the Court of Claims erred in denying, as allowable deductions under Section 23 (a) (2) of the Internal Revenue Code and the applicable regulation, legal expenses paid by restricted Indians in defending their right and title to property acquired under a will.

STATUTE AND REGULATIONS INVOLVED

The applicable portions of the pertinent statute and regulations are set forth in the Appendix, *infra,* pp. 11-13.

STATEMENT

The special findings of fact of the Court of Claims (R. 15-21) may be summarized as follows:

Petitioner is a citizen of the United States, a resident of Muskogee, Oklahoma, and the Superintendent of the Five Tribes Agency, which includes the Quapaw Tribe Sub-Agency; he is the acting representative of the Secretary of the Interior, who is by federal statute law the trustee of property of restricted Indians, including members of the Quapaw Tribe; and is the fiduciary of Agnes Quapaw Hoffman and Jean Anne Quapaw Hoffman whose individual federal income taxes are in controversy (R. 15).

Both taxpayers are citizens of the United States, residents of Ottawa County, Oklahoma, and restricted full-blood Quapaw Indians (R. 15), who inherited lands from Benjamin Quapaw, deceased; the lands are fully restricted and cannot be sold or otherwise disposed of without the approval of the Secretary of the Interior (R. 20).

Benjamin Quapaw, deceased, was a citizen of the United States, a full-blood restricted Quapaw Indian, and a resident of Ottawa County, Oklahoma, at the time of his death on May 26, 1926. At his death, the decedent was seized and possessed of three restricted allotments of Quapaw tribal lands, certain mineral leases thereon yielding a 10% royalty, certain other real property which had been purchased with funds received as royalties from such mineral leases, and certain personal property, including cash and bonds (R. 15-16). All of this property was fully restricted and could not be sold, alienated, hypothecated or otherwise disposed of without the approval of the Secretary of the Interior. Decedent, by will executed October 28, 1924, devised and bequeathed all of his property and estate to his wife, Agnes, and his daughter Jean Anne, in equal shares. Such will was approved "so far as it relates to property under control of the United States" by the Assistant Secretary of the Interior on March 14, 1927 (R. 16).

Sometime after the death of Benjamin Quapaw and after the approval of his last will, one Lilia

Quapaw Hanson unsuccessfully petitioned the Secretary of the Interior for an order declaring her to be entitled to one-half of the restricted trust estate of her alleged father, Benjamin Quapaw, deceased. Her petition was based upon allegations claiming that the deceased had married about 1870; that Lilia was born about 1874 as the lawful issue of that marriage, and that her parents had been divorced in accordance with Creek custom (R. 16).

Lilia Quapaw Hanson later instituted suit in the District Court of the United States for the Northern District of Oklahoma against Agnes Quapaw Hoffman, Jean Anne Quapaw Hoffman, and others, claiming an undivided one-half interest in all property, real, personal and mixed, restricted or unrestricted, of which her alleged father Benjamin Quapaw died seized. Such claim was based upon alleged facts showing Lilia and Jean Anne to be the only living children of Benjamin Quapaw, deceased, and upon other facts from which a question arose as to the validity of his marriage to Jean Anne's mother and also the validity of his last will and testament. The trial court held that it was without jurisdiction and dismissed the suit. This decision was, upon appeal, reversed and the case remanded with instructions. *Hanson* v. *Hoffman,* 113 F. 2d 780 (C. A. 10th). The lower court upon retrial held for the defendants. This decision is not reported (R. 16-17).

After the above-mentioned litigation had been concluded, one Stella White filed in the United States District Court for the Northern District of Oklahoma a civil suit claiming that she was a lineal descendant of Benjamin Quapaw by his alleged first marriage. The complaint in this suit named Agnes Quapaw Hoffman and Jean Anne Quapaw Hoffman defendants, and its allegations were similar to those in *Hanson* v. *Hoffman, supra.* The case went to trial and judgment was entered in favor of the defendants. It is not reported (R. 17).

During 1942, Agnes Quapaw Hoffman paid expenses incurred in the defense of the suit filed by Lilia Quapaw Hanson aggregating $30,050.95 and Jean Anne Quapaw Hoffman paid expenses similarly incurred aggregating $42,550.64. During 1943, Agnes Quapaw Hoffman paid expenses incurred in the defense of the suit filed by Stella White aggregating $32,732.22 (R. 17).

The policy of the Secretary of the Interior is and always has been that no restricted lands producing oil, gas, lead, zinc, or other valuable minerals, would be sold or the restrictions removed therefrom so long as such lands were valuable for the production of royalty income. By reason of this policy, the Secretary of the Interior would not consent to the sale or other disposition of the restricted allotted and inherited lands devised to the taxpayers herein by Benjamin Quapaw, deceased. The

continuing and permanent policy of the Secretary of the Interior is to defend the Indians against the encroachments or claims of non-Indians. When there is a dispute between Indians, the policy of the Department is not to take sides, but to allow the Indians to select their own counsel in all cases where litigation is necessary. In following this policy, the Department fixes the amount of attorney's fees to be expended from restricted funds, as was done in this case (R. 20-21).

Upon the foregoing facts, the Court of Claims held that the legal expenses paid by taxpayers in 1942 and 1943 in defense of their right to the property received from the estate of Benjamin Quapaw were not allowable deductions under Section 23 (a)(2) of the Internal Revenue Code and Section 29.23(a)-15 of Treasury Regulations 111. Accordingly it dismissed the petitions. (R. 21-26.)

ARGUMENT

Contrary to the petitioner's contention (Pet. 20-21), the legal expenses involved in this case were patently incurred, as the Court of Claims held, in defense of the taxpayers' right and title to the properties received under the will of Benjamin Quapaw, which titles were attacked in whole or in part in the suits filed by Lilia Hanson and Stella White (R. 16, 17).[1] As such, the expenses were

[1] Neither the findings of the Court of Claims nor the stipulation of facts (not included in the record in this Court)

properly held by the Court of Claims to be a part of the cost of acquiring the property and not to be deductible as ordinary and necessary expenses under Section 23 (a)(2) of the Internal Revenue Code (Appendix, *infra,* pp. 11-12). See Section 29.23 (a)-15(b) of Treasury Regulations 111 (Appendix, *infra,* p. 13). See also authorities cited by the Court of Claims (R. 24).

Indeed, the petitioner concedes (Pet. 20-21) that this holding would be correct in the ordinary case but endeavors to create an exception for the taxpayers here on the theory that as restricted Quapaw Indians they, unlike other citizens, are entitled to a more liberal construction of the statute in their favor (Pet. 13, 21-22) and, further, that denial of the claimed deductions to taxpayers operates unfairly since taxpayers as Indian wards do not have control over sale of their properties as do other citizens (Pet. 17-18, 22). These arguments have no merit.

This Court has held that restricted Indians, like other citizens, are liable to pay federal income taxes under the all-inclusive terms of the revenue laws, where there is no provision of law definitely and clearly exempting them from the tax. *Superintendent* v. *Commissioner,* 295 U. S. 418; cf. also *Oklahoma Tax Comm'n* v. *United States,* 319 U. S.

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furnishes any support for the petitioner's assertion (Pet. 21) that about three fourths of the property involved in the *Hanson* and *White* suits consisted of income which accrued after the death of Benjamin Quapaw.

598.[2] Section 23 (a)(2) of the Code and Section 29.23(a)-15(b) of the Regulations, here involved, do not expressly grant to restricted Indians the right to take annual deductions for non-business expenses of a capital nature. Such a right in their favor is not to be implied, and all the more so, since allowance of deductions from gross income is a matter of legislative grace, controlled by the terms of the statute granting the deduction, and does not turn on equitable considerations. *Deputy* v. *du Pont,* 308 U. S. 488, 493; *Interstate Transit Lines* v. *Commissioner,* 319 U. S. 590, 593. Nor is it inconsistent with the taxpayers' status as Indian wards not to exempt them from tax to the extent of not allowing them a deduction from gross income for capital expenditures. Cf. *Superintendent* v. *Commissioner, supra,* p. 421.

Moreover, the disallowance of the claimed deductions in this case does not discriminate against the taxpayers. All other citizens of the United States are denied deductions under Section 23 (a)(2) for similar expenditures. Although the petitioner asserts that the taxpayers in this case, unlike other taxpayers, will not, as restricted Indian wards, be able to sell the inherited properties and to deduct the expenditures in issue here as a cost of the

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[2] *Choate* v. *Trapp,* 224 U.S. 665, and *Carpenter* v. *Shaw,* 280 U.S. 363, cited by petitioner (Pet. 13), held that where there is doubt under a statute as to whether restricted Indians were intended to be exempt from taxation, the doubt is to be resolved in favor of exempting the Indians.

properties in determining their taxable profit or deductible loss on the sale (Pet. 17-18, 22), the record fails to support this assertion. It was found that the lands inherited from Benjamin Quapaw could not be disposed of without approval of the Secretary of the Interior and his policy was not to permit a sale of mineral producing lands so long as they were valuable for royalty purposes (R. 20). But there is nothing in the findings to suggest that, when the lands are no longer valuable for royalty purposes, they may not be sold. In any case taxpayers are hardly in a unique position in this respect since many taxpayers voluntarily adopt a policy of not selling mineral-bearing lands which are valuable for royalty purposes. Furthermore, petitioner has not shown that the taxpayers are not entitled to annual depletion deductions with respect to their royalty income from the leased mineral lands involved here (Sections 23 (m) and (n) and 114, Internal Revenue Code), such depletion deductions, of course, having the purpose of returning to taxpayers tax-free their total cost basis of the mineral-producing lands. See *United States* v. *Ludey,* 274 U. S. 295, 302; *Helvering* v. *Mountain Producers Corp.* 303 U. S. 376, 381.

There is thus no factual support in the record for petitioner's assumption that taxpayers will forever be barred from deducting the legal expenses if the deductions claimed in this suit are not allowed under Section 23 (a)(2). But even assuming

arguendo that this were so, that circumstance would not require allowance of the deductions. Section 23 (a)(2) of the Code and Section 29.23(a)-15(b) of the Regulations deny deductions for all expenses of a capital nature irrespective of whether or not a taxpayer will receive a tax benefit through deducting them in another form at some other time.

CONCLUSION

The decision of the court below is correct. There is no conflict. The petition should be denied.

Respectfully submitted,

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THERON LAMAR CAUDLE,
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Special Assistants to the Attorney General.

MARCH, 1950.

APPENDIX

Internal Revenue Code:

SEC. 23 [as amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798]. DEDUCTIONS FROM GROSS INCOME.

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(a) *Expenses.*—

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* * *

(2) *Non-trade or non-business expenses.*—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the manage-

ment, conservation, or maintenance of property held for the production of income.

* * *

(26 U.S.C. 1946 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23(a)-15. *Nontrade or Nonbusiness Expenses.*—(*a*) *In general.*—Subject to the qualifications and limitations in chapter 1 and particularly in section 24, an expense may be deducted under section 23(a)(2) only upon the condition that:

(1) it has been paid or incurred by the taxpayer during the taxable year (i) for the production or collection of income which, if and when realized, will be required to be included in income for Federal income tax purposes, or (ii) for the management, conservation, or maintenance of property held for the production of such income; and

(2) it is an ordinary and necessary expense for either or both of the purposes stated in (1) above.

* * * * *

Expenses, to be deductible under section 23 (a)(2), must be "ordinary and necessary," which presupposes that they must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of taxable income or to the management,

conservation, or maintenance of property held for the production of income.

(*b*) Except for the requirement of being incurred in connection with a trade or business, a deduction under this section is subject to all the restrictions and limitations that apply in the case of the deduction under section 23(a)(1)(A) of an expense paid or incurred in carrying on any trade or business. * * *

Expenditures incurred in defending or perfecting title to property, in recovering property (other than investment property and amounts of income which, if and when recovered, must be included in income), or in developing or improving property, constitute a part of the cost of the property and are not deductible expenses. Attorneys' fees paid in a suit to quiet title to lands are not deductible; but if the suit is also to collect accrued rents thereon, that portion of such fees is deductible which is properly allocable to the services rendered in collecting such rents. Expenditures incurred in protecting or asserting one's rights to property of a decedent as heir or legatee, or as beneficiary under a testamentary trust, are not deductible expenses. * * *

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